

SIGNED.

Dated: January 30, 2013



*James M. Marlar*

James M. Marlar, Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 11  
JESUS PADILLA, )  
 ) No. 4:11-bk-34514-JMM  
Debtor. ) **MEMORANDUM DECISION**

A continued hearing was conducted on January 15, 2013 on Final Approval of the Debtor’s Second Amended Disclosure Statement (ECF No. 133) and Confirmation of the Debtor’s Second Amended Plan of Reorganization (ECF No. 132). Counsel appeared for Debtor and for secured creditor Deutsche Bank National Trust Co., as Trustee for the Holders of the HSI Asset Securitization Corporation Trust 2007-HE1 (“Deutsche Bank”). Both attorneys raised the following threshold issue: whether Deutsche Bank timely filed its “Notice of Election Pursuant to 11 U.S.C. § 1111(b),” in order to have its claim treated as fully secured. The Notice of Election was filed on December 10, 2012 (ECF No. 141). The Court asked the parties to file supplemental briefs on the issue, and took the matter under advisement. Having considered the parties’ briefs, the entire record and the law, the Court now rules.

**FACTS AND PROCEDURE**

Debtor owns and operates a café in downtown Tucson. Although Debtor arguably qualifies as a “small business debtor,” pursuant to § 101(51D), he did not check that box on the petition and disputes that

1 classification in these proceedings. See Fed. R. Bankr. P. 1020(a) (providing that the debtor “shall state in  
2 the petition whether the debtor is a small business debtor”).<sup>1</sup>

3 Deutsche Bank holds a secured claim and first lien on Debtor’s residential rental property. It filed  
4 a secured proof of claim in the amount of \$157,552.07. The Second Amended Plan proposes to cram down  
5 the claim to \$50,000.

6 A hearing on approval of the First Amended Disclosure Statement was set for October 16, 2012.  
7 At the hearing, the Court determined that additional information was needed. The Court stated that this was  
8 a “small business” and that the Disclosure Statement would be “conditionally” approved, assuming the  
9 changes were made. The court also set the plan confirmation date for November 29, 2012.

10 No order was thereafter lodged or issued with regards to approval of the Disclosure Statement. For  
11 lack of an order, and based on the Court’s “conditional” approval of the Disclosure Statement, the  
12 November 29, 2012 hearing was calendared as a “HEARING ON FINAL APPROVAL OF DEBTOR’S  
13 DISCLOSURE STATEMENT AND CONFIRMATION OF PLAN.”

14 Meanwhile, on November 2, 2012, Debtor had filed a Second Amended Disclosure Statement,  
15 which contained the required additional information, and a Second Amended Plan (ECF Nos. 132, 133).  
16 Deutsche Bank objected to the plan (ECF No. 134) and voted to reject the plan (ECF No. 136).

17 Despite the fact that there was not yet any approval order entered with regard to the Disclosure  
18 Statement, Debtor’s notice for the November 29th hearing was captioned “Order Establishing Bar Date for  
19 Acceptance or Rejection of Plan and Setting Confirmation Hearing.” (ECF No. 130). The Certificate of  
20 Service was captioned as follows: “Certificate of Service by Mail Re: Second Amended Disclosure  
21 Statement[;] Second Amended Plan[;] Notice of Bar Date for Ballot Return & of Confirmation Hearing[;]  
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25 <sup>1</sup> In 2005, the BAPCPA amendments changed the “election” process by deleting the  
26 election language in § 1121(e), and by amending former § 101(51C) and defining a “small business  
27 case” as “a case filed under chapter 11 of this title in which the debtor is a small business debtor.” See  
28 11 U.S.C. § 101(51C) ; see also 2008 Advisory Committee Note to Rule 1020 (clarifying that a small  
business debtor no longer has discretion to proceed or not proceed as a “small business debtor”). Rule  
1020(a) further provides that “the status of the case as a small business case shall be in accordance with  
the debtor's statement under this subdivision, unless and until the court enters an order finding that the  
debtor's statement is incorrect.” Fed. R. Bankr.P. 1020(a).

1 And Ballots to Eligible Creditors.” (ECF No. 137). There was no mention of the final approval of the  
2 Disclosure Statement, nor was there an opportunity given for filing objections to the Second Amended  
3 Disclosure Statement.<sup>2</sup>

4 At the November 29, 2012 hearing, the court subsequently continued the hearing(s).  
5 Deutsche Bank then filed its § 1111(b) election notice on December 10, 2012.

6  
7 **DISCUSSION**  
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9 Federal Rule of Bankruptcy Procedure, Rule 3014, governs the timing of the § 1111(b) election.  
10 It provides, in relevant part:

11 An election of application of §1111(b)(2) of the Code by a class of secured creditors in a  
12 chapter 9 or 11 case may be made at any time prior to the conclusion of the hearing on the  
13 disclosure statement or within such later time as the court may fix. If the disclosure  
14 statement is conditionally approved pursuant to Rule 3017.1, and a final hearing on the  
disclosure statement is not held, the election of application of § 1111(b)(2) may be made not  
later than the date fixed pursuant to Rule 3017.1(a)(2) or another date the court may fix.

15 Fed. R. Bank. P. 3014.

16 In order to determine whether the Notice of Election was timely, the Court must first determine  
17 whether the hearing on the Disclosure Statement has been concluded.

18 Debtor’s position is that the small business rules do not apply to him and that he is not a small  
19 business debtor, since he did not designate such a case on the petition.<sup>3</sup> Instead, he maintains that the Court  
20 used its equitable authority to routinely approve the Disclosure Statement on October 16, 2012, subject to  
21 insertion of the modifications. Debtor also points out that Deutsche Bank was given electronic notice of  
22 the October 16, 2012 hearing and did not object to the Disclosure Statement. The Court’s directions were  
23 then complied with in the Second Amended Disclosure Statement, which was filed on November 2, 2012.

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25 <sup>2</sup> The docket entry @ ECF No. 137 incorrectly references the attachment ECF No. 130 as  
26 an “Order Approving Disclosure Statement and Setting Confirmation Hearing,” when that order is  
actually captioned “Order Establishing Bar Date for Acceptance or Rejection of Plan and Setting  
Confirmation Hearing.”

27 <sup>3</sup> Debtor concedes that in a small business case “ it would be proper for a creditor to both  
28 object to the disclosure statement at the confirmation hearing but [sic] also to make the 1111(b) election  
at that time.” (Debtor’s Supp’l Brief, p. 3, ECF No. 147).

1 Finally, Debtor argues that no further hearings were expressly ordered for approval of the Disclosure  
2 Statement after the October 16, 2012 hearing. Thus, the § 1111(b) election was untimely filed thereafter,  
3 according to Debtor.

4 Deutsche Bank does not challenge the Debtor's designation as a non-small business debtor.  
5 Consequently, it contends that "conditional" approval of the Disclosure Statement was not available to the  
6 Debtor and, thus, that the Second Amended Disclosure Statement is still awaiting approval. It supports this  
7 argument with the Court's calendar, which designated the three continued hearings as combined hearings  
8 on final approval of the Disclosure Statement and Plan confirmation.

9 In a non-small business case, an order approving the disclosure statement would normally be  
10 required prior to the hearing on plan confirmation. See 11 U.S.C. § 1125(b); Official Form 13 - Order  
11 Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined  
12 with Notice Thereof.

13 Deutsche Bank also raises due process concerns if the Court were to hold that the Disclosure  
14 Statement was finally approved on October 16, 2012. Undisputedly, Debtor added, for the first time,  
15 material information to the Second Amended Disclosure Statement consisting of income/expense  
16 projections and a more detailed liquidation analysis. For the November 29, 2012 hearing, there was no  
17 opportunity given in the Order or Notice of Hearing for filing objections to the Second Amended Disclosure  
18 Statement.<sup>4</sup>

19 Deutsche Bank draws a persuasive analogy to a case where the creditor was allowed to withdraw  
20 its § 1111(b) election after the debtor materially changed its disclosure statement. In re Scarsdale Realty  
21 Partners, L.P., 232 B.R. 300 (Bankr. S.D.N.Y. 1999). Here, material information was added after Deutsche  
22 Bank made its election.

23 In the absence of an order either conditionally or finally approving the Disclosure Statement, the  
24 Court finds the position of Deutsche Bank to be better supported by the facts and law. Debtor's counsel  
25 was aware that the Disclosure Statement had been "conditionally" approved by an oral ruling at the  
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27 <sup>4</sup> In fact, the Certificate of Service at ECF No. 137, mailed on November 2, 2012,  
28 referred to an attachment entitled "Notice of Hearing," at ECF No. 118, which was the notice for  
the original October 16, 2012 hearing on approval of the Disclosure Statement.

1 October 16, 2012 hearing, yet counsel failed to lodge an order of either conditional or final approval.  
2 Because final approval of the Disclosure Statement was still pending, the Court calendared the next three  
3 hearings, on November 29, 2012, December 11, 2012, and January 15, 2013, as a combined hearing on final  
4 approval of the Disclosure Statement and Plan confirmation.

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6 **CONCLUSION**  
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8 Therefore, the Court finds and concludes that Deutsche Bank's Notice of Election was timely filed  
9 prior to conclusion of the hearing on approval of the Disclosure Statement. The Court perceives no reason  
10 to waste additional time soliciting objections to the Second Amended Disclosure Statement, when no  
11 objections were filed to date.<sup>5</sup> Therefore, a separate order shall be entered giving Debtor 30 days in which  
12 to file an Amended Plan, obtain a new plan confirmation date from the Courtroom Deputy, and lodge a  
13 Form 13 Order approving the Disclosure Statement and setting the plan confirmation hearing. Once signed,  
14 Debtor shall notice the Order to all creditors and interested parties pursuant to Rule 2002(b).

15  
16 DATED AND SIGNED ABOVE.  
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18 To be NOTICED by the BNC ("Bankruptcy Noticing Center") to:  
19 Debtor's Attorney  
20 Deutsche Bank's Attorney  
21 Office of the U.S. Trustee  
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<sup>5</sup> Although Deutsche Bank's brief states that it objected to the Disclosure Statement on November 12, 2012, the pleading to which it apparently refers (ECF No. 134) is captioned "Objection to Chapter 11 Plan." (Deutsche Bank's Brief, ECF No. 148, p.2:19-20).